



November 8, 2019

**Via Electronic Mail and FOIA Online**

National Freedom of Information Officer  
U.S. Environmental Protection Agency  
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**Re: Freedom of Information Act Request**

To Whom It May Concern:

We write on behalf of the Sierra Club to request that the United States Environmental Protection Agency ("EPA") provide copies of the records described below, pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 and the EPA regulations at 40 C.F.R. § 2.100 *et seq.* This request concerns EPA's examination and regulation of per- and polyfluoroalkyl substances ("PFAS").

The Sierra Club is a nonprofit organization founded in 1892 that has grown to include over 3.5 million members and supporters nationwide. The Sierra Club's goal is to promote the responsible use of the earth's ecosystems and educate humanity to protect and restore the environment. *See, e.g., About the Sierra Club*, Sierra Club, <http://www.sierraclub.org/about> (last visited Nov. 1, 2019). As part of its broader mission, the organization advocates for the cleanup and regulation of toxic chemicals, including PFAS. To this end, since the passage of the Toxic Substances Control Act ("TSCA"), Sierra Club has worked to strengthen and fully implement its mission by providing essential services to its membership including education and dissemination of information, public representation, and litigation for full and effective implementation of TSCA's protections.

**DEFINITIONS**

For the purposes of this request, the terms "record" and "records" mean all materials in whatever form (handwritten, typed, electronic or otherwise produced, reproduced or stored) in EPA's possession as of **November 8, 2019**, including, but not limited to, letters, memoranda, correspondence, notes, applications, completed forms, studies, reports, reviews, guidance documents, policies, notes of telephone conversations, telefaxes, e-mails, text messages, internet chat logs, documents, databases, drawings, graphs, charts, photographs, minutes of meetings, electronic and magnetic recordings of meetings, and any other compilation of data from which

information can be obtained. Without limitation, the records requested include records relating to the topics described above at any stage of development, whether proposed, draft, pending, interim, final, or otherwise. All of the foregoing are included in this request if they are in the possession of or otherwise under the control of the EPA or any of its offices nationwide, including responsive records in or on the searchable databases, personal computers, cellphones, or other devices, or personal email accounts used by any federal employee or official if used for any governmental purpose.

For purposes of this Request, records shall not include Premanufacture Notices (“PMNs”), submitted pursuant to the Toxic Substances Control Act (“TSCA”), 15 U.S.C. §§ 2604(a), (b) or orders issued under 15 U.S.C. § 2604(e).

## RECORDS REQUESTED

**Request I: Records relating to Dunn Statement:** Alexandra Dunn of EPA stated on or about April 8, 2019 that “of the 602 ‘active’ [PFAS] chemicals on the agency’s TSCA inventory of chemicals in commerce, EPA has only reviewed 58 percent of them” (the “Dunn Statement”). See Dave Reynolds & Lara Beaven, *Wheeler Faults States’ Criticism of EPA’s PFAS Action Plan As ‘Inaccurate’*, Inside EPA (Apr. 8, 2019), <https://insideepa.com/daily-news/wheeler-faults-states-criticism-epa-s-pfas-action-plan-inaccurate>. The Sierra Club requests that EPA provide the following records:

- A. Any and all records, including but not limited to lists or spreadsheets, compiling or containing information from which the Dunn Statement was derived (i.e., lists or spreadsheets showing active PFAS on the TSCA inventory; lists or spreadsheets showing which of those active PFAS EPA has or has not reviewed and why);
- B. Any and all records that have been or could be used to determine the percentage of the active PFAS on EPA’s TSCA inventory EPA has or had reviewed at any point in time that were created after those documents responsive to Request I.A.; and,
- C. Any and all correspondence and/or notes discussing: (i) the development of documents responsive to Requests I.A. and I.B.; (ii) the basis for the Dunn Statement; or (iii) the Dunn Statement.

**Request II: Records relating to PFAS Action Plan statement regarding PMN/SNUN submissions:** EPA’s “PFAS Action Plan” issued in February 2019 states that since the beginning of the PFOA Stewardship Program, EPA has reviewed “more than 300 PMN or SNUN submissions for PFAS substances . . . of which about 200 were regulated by the EPA, typically under a section 5(e) Order” (the “PMN Statement”). See EPA, EPA 823-R1-8004, EPA’s Per- and Polyfluoroalkyl Substances (PFAS) Action Plan 18 (Feb. 2019), [https://www.epa.gov/sites/production/files/2019-02/documents/pfas\\_action\\_plan\\_021319\\_508\\_compliant\\_1.pdf](https://www.epa.gov/sites/production/files/2019-02/documents/pfas_action_plan_021319_508_compliant_1.pdf). The Sierra Club requests that EPA provide the following records:

- A. Any and all records, including but not limited to lists or spreadsheets, compiling or containing information from which the PMN Statement was derived;
- B. Any and all records that have been or could be used to determine the number of PMN or SNUN submissions for PFAS substances EPA has reviewed and/or regulated that were created after those documents responsive to Request II.A.; and,
- C. Any and all correspondence and/or notes discussing: (i) the development of documents responsive to Request II.A and II.B; (ii) the basis for the PMN Statement; or (iii) the PMN Statement.

**Request III: Records relating to PFAS Action Plan statement regarding Low Volume**

**Exemption applications:** The PFAS Action Plan also states that during the same time period referenced in Request II, EPA reviewed “more than 300 Low Volume Exemption Applications . . . most of which were granted based on restrictions/controls in the original or amended submissions” (the “LVE Statement”). See PFAS Action Plan at 18. The Sierra Club requests that EPA provide the following records:

- A. Any and all records, including but not limited to lists or spreadsheets, compiling or containing information from which the LVE Statement was derived;
- B. Any and all records that have been or could be used to determine the number of Low Volume Exemption Applications for PFAS substances submitted to EPA, how many were granted based on restrictions/controls in the original or amended submissions that were created after those documents responsive to Request III.A.; and,
- C. Any and all correspondence and/or notes discussing: (i) the development of documents responsive to Request III.A and III.B; (ii) the basis for the LVE Statement; or (iii) the LVE Statement.

**EXEMPT RECORDS**

If you regard any of the requested records to be exempt from required disclosure under FOIA, we request that you disclose them nevertheless. Such disclosure would serve the public interest, in line with the purposes of TSCA, by educating citizens about EPA’s review and assessment of PFAS and about potential risks to public health and the environment posed by PFAS. See *Dow Chem. Co. v. EPA*, 605 F.2d 673, 676 (3d Cir. 1979) (stating that Congress passed TSCA “in order to prevent the general environment from becoming the laboratory in which harmful effects of chemicals are discovered”). Should you nonetheless invoke a FOIA exemption with regard to any of the requested records, please include in your full or partial denial letter sufficient information for the Sierra Club to appeal the denial. To comply with legal requirements, the following information must be included:

- 1. Basic factual material about each withheld item, including the originator, date, length, general subject matter, and location of each item; and

2. Explanations and justifications for denial, including the identification of the category within the governing statutory provision under which the document (or portion thereof) was withheld and a full explanation of how each exemption fits the withheld material.

If you determine that portions of a record requested are exempt from disclosure, please redact the exempt portions and provide the remainder of the record to the Sierra Club at the address listed below. If the requested documents do not exist, please indicate that in your written response.

### **FEE WAIVER REQUEST**

The Sierra Club requests a waiver of all fees in connection with this FOIA request pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). Here, “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” *Id.*; 40 C.F.R. § 2.107(l)(1). FOIA carries a presumption of disclosure and Congress designed FOIA’s fee waiver provision to allow nonprofit public interest groups—such as the Sierra Club—to access government documents without the payment of fees.

EPA examines four factors when considering whether a request contributes to public understanding: 1) the subject of the request; 2) the informative value of the information being disclosed; 3) the contribution to an understanding of the subject by the public is likely to result from disclosure; and 4) the significance of the contribution to public understanding. *See* 40 C.F.R. § 2.107(l)(2). Additionally, to determine whether the request “is not primarily in the commercial interest of the requester” the government will consider two factors: 1) the existence and magnitude of a commercial interest, and 2) the primary interest in disclosure. *See id.* § 2.107(l)(3).

As demonstrated below, each of the factors relevant to a fee waiver request weigh in favor of granting the fee waiver request here. Moreover, federal courts have held that FOIA “is to be liberally construed in favor of waivers for noncommercial requesters.” *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Health & Human Servs.*, 481 F. Supp. 2d 99, 106 (D.D.C. 2006) (quoting *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987)).

#### **A. The Request Is in the Public Interest**

##### ***Factor 1: The Requested Records Concern the Operations or Activities of the Federal Government***

The first factor for a fee waiver requires that the subject of the request concern “identifiable operations or activities of the Federal government, with a connection that is direct and clear, not

remote.” 40 C.F.R. § 2.107(l)(2)(i). The Department of Justice’s policy guidance expressly states that “in most cases records possessed by a federal agency will likely meet this threshold.” DOJ, FOIA Update: New Fee Waiver Policy Guidance Vol. VIII, No. 1 (1987), § III.A.(1), *available at* <https://www.justice.gov/oip/blog/foia-update-new-fee-waiver-policy-guidance> (“FOIA Guidance”). Sierra Club’s request meets the threshold because, under TSCA, EPA is supposed to review information that chemical manufacturers provide in PMNs and PMN exemption applications, and take steps to protect the public when necessary.

***Factor 2: Disclosure of the Requested Records is Likely to Contribute to Public Understanding of Government Operations or Activities***

The next factor EPA considers is whether disclosure of the requested records is “likely to contribute to an understanding of government operations or activities.” 40 C.F.R. § 2.107(l)(2)(ii) (internal quotations omitted). To satisfy this requirement, the disclosable records must be “meaningfully informative about government operations or activities.” *Id.* Information not “already ... in the public domain” is considered more likely to contribute to an understanding of government operations or activities. *Id.*; *see also* FOIA Guidance § III.A(2).

As far as the Sierra Club can ascertain, the information it seeks is not in the public domain; if it is, Sierra Club asks that you kindly provide instructions on how members of the public may obtain the information. The information that the Sierra Club seeks will significantly contribute to the public’s understanding of the considerations underlying EPA’s actions that affect its decisions on PMNs and PMN exemption applications. The information will also help the public by providing more information about which PFAS are presently in commerce and which of those potentially harmful chemicals are in need of further study. The information will facilitate meaningful public participation about the agency’s decisions regarding which PFAS need to be regulated and how, therefore fulfilling the requirement that the documents requested be “meaningfully informative” and “likely to contribute” to an understanding of the agency’s decision-making process.

***Factor 3: Disclosure of the Requested Records Will Contribute to the Understanding of a Broad Audience of Persons Interested in the Requested Pre-Manufacture Notices and the Information Contained Therein.***

EPA next considers whether disclosure will contribute to “public understanding” of the subject. 40 C.F.R. § 2.107(l)(2)(iii). To qualify for a fee waiver, disclosure should “contribute to the understanding of a reasonably broad audience of persons interested in” the subject matter of the FOIA request, as opposed to the “individual understanding” of the requester. *Id.* In evaluating a fee waiver request, EPA considers whether the requester has “expertise in the subject area and ability and intention to effectively convey information to the public.” *Id.* Federal courts have held that public interest groups satisfy this requirement where they demonstrate an “ability to understand and disseminate the information.” *Judicial Watch, Inc. v. Dep’t of Justice*, 122 F. Supp. 2d 5, 10 (D.D.C. 2000).

Members of the public indisputably have an interest in learning about which PFAS they may be exposed to as consumers, workers, or individuals living near manufacturing facilities. And as EPA has recognized, clear communication of its data on PFAS can assist communities engaging in risk management. PFAS Action Plan at 5–6, 38. Disclosure will “contribute to the understanding of a reasonably broad audience of persons interested in” protecting themselves from unwitting exposure to PFAS and understanding whether those substances are being regulated by federal authorities and how. Such information will be of special interest to communities regularly exposed to these substances, such as the up to 110 million individuals across the country exposed to PFAS-contaminated drinking water. David Andrews, *Report: Up to 110 Million Americans Could Have PFAS-Contaminated Drinking Water*, Env'tl. Working Grp. (May 22, 2018), <https://www.ewg.org/research/report-110-million-americans-could-have-pfas-contaminated-drinking-water>. Furthermore, the public has a strong financial interest in seeing that EPA spends tax dollars effectively, in furtherance of its mission, and in compliance with federal environmental law. All taxpayers contribute funding for the agency’s activities and have an interest in the agency’s handling of resources. The public has an interest in assessing whether EPA is adequately protecting the public from toxic chemicals.

Sierra Club is a national nonprofit environmental organization that, as described above, has demonstrated involvement in TSCA and toxic substance issues for decades. It has made the promotion of safe and healthy communities free from the health burdens of toxic chemicals one of its guiding policies. *See* Sierra Club Toxic Chemicals Policy (2018), <https://www.sierraclub.org/sites/www.sierraclub.org/files/2018-Toxics%20Policy.pdf>. The organization’s Toxics Program describes the protection of communities from the harmful effects of PFAS as a key initiative. *About the Toxics Program*, Sierra Club, <https://www.sierraclub.org/toxics/about-toxics-program> (last visited Oct. 29, 2019). Accordingly, Sierra Club has developed expertise related to both the regulation of chemicals, including PFAS, under the Toxic Substances Control Act (“TSCA”) and the scientific literature regarding PFAS. *See, e.g.*, Sierra Club, PFAS Action Kit (2018), <https://www.sierraclub.org/sites/www.sierraclub.org/files/program/documents/Web%20PFAS%20toolkit.pdf>; Sonya Lunder, *Congress Is Coming for Chemical Contamination*, Sierra Club (May 20, 2019), <https://www.sierraclub.org/articles/2019/05/congress-coming-for-chemical-contamination>. Because of its expertise, Sierra Club is well-prepared to evaluate the requested records once they are received.

The Sierra Club also unquestionably has the “expertise in the subject area” and “ability and intention” to broadly disseminate the information requested in a manner that contributes to the understanding of the public at large 40 C.F.R. § 2.107(l)(2)(iii). Sierra Club disseminates the information it receives through FOIA requests in a variety of ways, including, but not limited to: analysis and distribution to the media, distribution through publication and mailing, posting on the Club’s website, emailing and list serve distribution to our members and supporters across the U.S., and via public meetings and events. Every year the Sierra Club website receives roughly 40,730 unique visits and 100,381 page views; on average, the site gets 104 visits per day.

Sierra Magazine, which is a quarterly magazine published by the Sierra Club, has a circulation of approximately 1,000,000. *Sierra Club Insider*, an electronic newsletter, goes to over 850,000 people twice a month. In addition, Sierra Club disseminates information obtained by FOIA requests through comments to administrative agencies, and where necessary, through the judicial system.

Sierra Club's detailed description of its capacity and will to disseminate information gathered from the requested records demonstrates that disclosure of the records will contribute to public understanding. See *Judicial Watch v. Rossotti*, 326 F.3d 1309, 1314 (D.C. Cir. 2003) (requester demonstrates likelihood of contributing to public understanding of government operations and activities where it specifies multiple channels for disseminating information and estimated viewership numbers).

***Factor 4: The Contribution to Public Understanding of Government Operations or Activities Will Be Significant***

The fourth factor EPA considers is whether the records are "likely to contribute 'significantly' to public understanding of government operations or activities." 40 C.F.R. § 2.107(l)(2)(iv); see also *Fed. CURE v. Lappin*, 602 F. Supp. 2d 197, 205 (D.D.C. 2009) (the relevant test is whether public understanding will be increased after disclosure, as opposed to the public's understanding prior to the disclosure). Where information is not currently available to the general public, and where "dissemination of information . . . will enhance the public's understanding," the fourth public interest factor is satisfied. *Fed. CURE*, 602 F. Supp. 2d at 205.

There is currently little or no information publicly available about the number and identity of all PFAS on the TSCA Inventory that EPA reviewed and approved for manufacture and commerce. Nor is there information about how EPA reviewed these substances. Absent disclosure of the records requested, the public lacks sufficient understanding of which unregulated PFAS consumers, workers, and those living near chemical manufacturing plants presently are exposed to.

As explained above, the records requested will contribute to the public understanding of the EPA's role in this process, and on EPA's "operations and activities" associated with this critically important information.

**B. There Is No Commercial Interest in Disclosure of the Requested Records**

The Sierra Club has no commercial interest in the requested records. Nor does the Sierra Club have any intention to use these records in any manner that "furthers a commercial, trade, or profit interest" as those terms are commonly understood. The Sierra Club is a tax-exempt organization under section 501(c)(4) of the Internal Revenue Code, and as such has no commercial interest. The requested records will be used for the furtherance of Sierra Club's

mission to inform the public on matters of vital importance to the environment and public health.

\* \* \*

Because the public will be the primary beneficiary of this requested information, Sierra Club respectfully asks EPA to waive processing and copying fees pursuant to 5 U.S.C. § 552(a)(4)(A). In the event that your agency denies a fee waiver, please send a written explanation for the denial. If you deny our request for a fee waiver, please provide an estimate of all charges for supplying the records we have requested in advance and allow me to respond to the estimate before proceeding with fulfilling the request.

### **RECORD DELIVERY**

To the extent practicable, Requester seeks copies of all requested records electronically, in native file format, or, if that is not practicable, with full metadata for all fields. *See* 5 U.S.C. § 552(a)(3)(B) (agency shall provide records in any form or format if the record is readily reproducible in that form or format).

If any information requested herein was, but is no longer, in EPA's possession or subject to its control, state whether it is (a) missing or lost, (b) has been destroyed, (c) has been transferred voluntarily or involuntarily to others, or (d) otherwise disposed of. For each instance of information no longer in EPA's possession or subject to its control, explain: 1) the circumstances surrounding the information's disposition; 2) the authorization for such disposition; and, 3) the exact or approximate date of the disposition.

Agencies are advised to "make discretionary disclosures of information" and refrain from withholding records "merely because [they] can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption." Memorandum from the Attorney General to Heads of Executive Departments and Agencies (Mar. 19, 2009), <https://www.justice.gov/sites/default/files/ag/legacy/2009/06/24/foia-memo-march2009.pdf> . If you claim that any of the foregoing requested information is exempt from mandatory disclosure, we respectfully request that you:

- (1) Provide an index of all documents containing the requested information, reflecting the date, author, addressee, number of pages, and subject matter of such documents;
- (2) State the exemption you deem to be applicable to each information request;
- (3) State with particularity the reason why such exemption is applicable to each information request;



- (4) Examine each information request to determine if reasonably segregable non-exempt information exists that may be released after redacting information deemed to be exempt; and
- (5) Exercise your discretion to release such records notwithstanding the availability of a basis for withholding.

Sincerely,

/s/ Suzanne Novak  
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